DATO' SERI ANWAR IBRAHIM

v.

DATO' SERI DR MAHATHIR MOHAMAD

COURT OF APPEAL, KUALA LUMPUR
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-663-99]
9 DECEMBER 2000

TORT: *Defamation - Slander - Allegations of homosexuality, sodomy and masturbation against plaintiff - Defences - Justification - Qualified privilege - Whether trial judge correct in striking out plaintiff's writ - Whether trial judge erred in principle - Reliance on convictions of third parties - Defamation Act 1957, s. 8 - Whether plaintiff's claim obviously unsustainable - Rules of the High Court 1980, O. 18 r. 19*

The appellant had earlier filed a defamation suit against the respondent in the High Court. He alleged that the respondent had uttered an offending statement and contended that the offending words were defamatory of him. The High Court allowed the respondent's application to strike out the appellant's writ of summons and statement of claim pursuant to O. 18 r. 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('RHC') and the inherent jurisdiction of the court. The appellant appealed arguing that the trial judge had erred in principle and that the admitted facts did not justify the use of the word 'masturbation.' On the issue of qualified privilege, the appellant contended that the trial judge had failed to consider the question of malice that was brought up in the appellant's reply to the statement of defence.

Held:
Per Ahmad Fairuz JCA

[1] The trial judge had not erred in principle as he had taken into account relevant considerations and there was nothing in his judgment that indicated that he had asked himself the wrong questions.

[2] On the use of the word 'masturbation', s. 8 of the Defamation Act 1957 had covered the situation.

[3] The appellant's removal from his cabinet and party positions was of public interest and it was the respondent's duty to explain the said removals to the nation. The relevant facts had led the trial judge to conclude that the offending words or statement had been spoken by the respondent "on an occasion of qualified privilege."

[4] The trial judge had indeed considered the issue of malice as evinced in the appeal record. He had set out his reasons and concluded that the respondent's mind was "devoid of malice" when he uttered the offending words.

[5] The respondent was sheltered by the defences of justification and qualified privilege; the claim of the appellant was obviously unsustainable.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah memfailkan guaman fitnah terhadap responden di Mahkamah Tinggi. Perayu mengatakan bahawa responden telah membuat pernyataan yang menggusarkan dan kata-katanya mempunyai unsur-unsur fitnah. Mahkamah Tinggi telah membenarkan permohonan responden membatalkan writ saman dan pernyataan tuntutan perayu mengikut A. 18 k. 19(1)(a), (b) dan (d) Kaedah-kaedah Mahkamah Tinggi 1980 dan bidang-kuasa sedia ada mahkamah. Perayu telah memberi hujah bahawa hakim yang bijaksana salah dalam prinsip, bahawa fakta yang diterima tidak justifikasi penggunaan perkataan 'masturbation' dan mengenai isu perlindungan bersyarat hakim tidak mengambil dalam pertimbangan isu niat-jahat yang telah dibangkitkan dalam jawapan perayu kepada pernyataan pembelaan.

Diputuskan:
Oleh Ahmad Fairuz HMR

[1] Hakim yang bijaksana tidak salah dalam prinsip kerana beliau telah mengambil dalam pertimbangan segala balasan yang relevan dan tidak terdapat apa-apa dalam penghakiman beliau yang menunjukkan beliau telah menyoal soalan yang salah.

[2] Menyentuh isu penggunaan perkataan 'masturbation', s. 8 Defamation Act 1957 diterima sebagai meliputi situasi tersebut.

[3] Penyingkiran perayu dari kabinet dan jawatannya dari parti-parti berkenaan menarik minat seluruh masyarakat awam dan ia adalah tanggungjawab responden untuk menjelaskan penyingkiran tersebut kepada rakyat negara. Fakta relevan telah menuntun beliau untuk membuat kesimpulan bahawa pernyataan menggusarkan yang dikeluarkan oleh responden adalah dibawah keadaan perlindungan bersyarat.

[4] Hakim yang bijaksana telah mengambil dalam pertimbangan isu niat-jahat seperti mana yang dapat dilihat didalam rekod rayuan. Dengan memberi alasan-alasannya, beliau telah membuat kesimpulan bahawa responden langsung tidak mempunyai perasaan niat-jahat apabila responden mengeluarkan pernyataan yang menggusarkan itu.

[5] Responden telah dilindung oleh pembelaan justifikasi dan perlindungan bersyarat, oleh itu tuntutan perayu tidak boleh diterima.

[Rayuan ditolak dengan kos.]

Case(s) referred to:
AG of Duchy of Lancaster v. L & NW Rly Co [1892] 3 Ch 274 ***(refd)***
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Coprn Bhd [1993] 4 CLJ 7 ***(refd)***
Lange v. Atkinson 3 NZLR [1988] 424 ***(refd)***
Levene v. Roshan [1970] 1 WLR 1322 ***(foll)***
Lim Ah Moi v. AMS Periasamy Suppiah Pillay [1997] 3 CLJ 629 ***(refd)***
Marchioness of Huntley v. Gaskell [1905] 2 Ch D 656 ***(refd)***
Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 ***(refd)***
Re Tan Ah Poi; ex p Multi-Purpose Finance Bhd [1999] 2 CLJ 694 ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 8
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d)

Other source(s) referred to:
Gatley on Libel & Slander, 9th edn, para 14.49

For the appellant - Karpal Singh (Gobind Singh Deo with him); M/s Karpal Singh & Co
For the respondent - Adnan Shuaib (N Chandran with him); M/s Adnan Sundra & Low

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-23-07-99]

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Fairuz JCA:

The appellant filed a defamation suit against the respondent in the High Court of Malaya at Kuala Lumpur. The amended statement of claim of the appellant alleged that the respondent had, on 22 September 1998, uttered the following words (the offending words):

> I had disbelieved the homosexuality charges at first but was convinced when I personally interviewed Anwar's partner.
>
> They had not only performed sodomy, but during the process, he was ... I don't know how you call it ... he was masturbating this man.
>
> Do I go around town and tell the world that this is what my deputy was doing?

It was alleged by the appellant that the respondent spoke and published the offending words to a crowd of journalists from both the national and international media. The appellant contended that the offending words were defamatory of him. As such the appellant prayed for:

(1) damages amounting to RM100 million with interests;

(2) an injunction restraining the defendant by himself or by his servants or agents from further uttering the offending words or words to the like effect of or concerning the plaintiff; and

(3) any other relief the court found just and proper.

In his defence, the respondent admitted holding a press conference on 22 September 1998. In attendance at the conference were national and foreign journalists. To a question by a journalist as to why the appellant had been dismissed as Deputy Prime Minister, Minister of Finance and Deputy President of UMNO, the respondent stated the following:

> It is difficult for me to explain and I think it will be difficult for them to explain. I'll tell you what the police tells me ... (Dr. Munawar) Anwar ... Anees told them. They had not only performed sodomy but during the process he was doing ... he was ... I don't know what you call it, he was masturbating this man. This is what ... do I go around the town and tell the world that this is what my deputy was doing? And yet he did it. I mean, I cannot understand how a man would invent a story like that but this is what he told me, he told the police. He didn't tell me, he told the police. Their behaviour was despicable. And this is a man who talks about other people being despicable. His behaviour was despicable. (hereinafter referred to as 'the statement')

The statement was, according to the respondent, based on matters that were already of public knowledge and on information related to him by the police. The respondent contended that the statement is true in fact and in substance. He also relied on the defence of qualified privilege.

On 24 May 1999, the respondent applied to strike out the indorsement in the amended writ of summons and the amended statement of claim pursuant to O. 18 r. 19(1)(a), (b) and (d) of the Rules of the High Court 1980 (RHC 80) and the inherent jurisdiction of the court. After considering the affidavits filed by both parties and the submissions made by counsel, the learned trial judge allowed the respondent's application.

Before us counsel for both parties agreed that the learned High Court judge was exercising a discretionary power when allowing the respondent's application. Hence, both counsel referred us to the case of *Paya Terubong Estates Sdn. Bhd. v. Pusaka Warisan Sdn. Bhd.* [1998] 2 CLJ 909 whilst the

learned respondent's counsel also referred us to the case of *Lim Ah Moi v. AMS Periasamy Suppiah Pillay* [1997] 3 CLJ 629. It is clear from these authorities that in appeals against exercise of discretion, the role of an appellate court is one of review only. It is for the appellant to convince the appellate court that the learned judge has erred in principle or has failed to take into account relevant considerations or has asked himself the wrong questions. If the appellant succeeds in discharging that burden, the appellate court will then intervene and set matters right by exercising its own discretion.

It was argued by the appellant that the learned trial judge was wrong when he based his finding that there was justification on third parties' admissions or pleas of guilt. Such convictions can only be conclusive as against the third party itself, that is to say, as against Munawar and Sukma, and cannot be extended to the appellant. It was also pointed out that the respondent was relying on what were told to him by the police when he uttered the offending words or the statement. This was obviously hearsay evidence. And the learned trial judge fell into error when he took this into consideration.

The learned respondent's counsel submitted that the convictions formed part of the respondent's defence. The convictions in fact, according to counsel, show that the appellant had committed the acts of gross indecency as spoken of in the offending words or the statement. Thus, the offending words or the statement are, according to counsel, true in substance and in fact. Accordingly, argued the respondent's counsel, the defence of justification is clearly available to the respondent. It was also contended by counsel that the respondent's words when tested against the facts surrounding the convictions would render the appellant's claim to be "obviously unsustainable" and consequently the respondent's application should be allowed.

In his grounds of judgment, the learned trial judge referred to the convictions of Munawar and Sukma. He referred in particular to the facts read out in the Sessions Court in respect of both the cases. He also referred to the parts of the affidavits which disclosed that the respondent had received information from the police about the appellant's homosexual activities as early as in 1993 and the appellant's homosexual relationships with Munawar and Sukma. These facts, according to the learned trial judge, point directly to the involvement of the appellant as stated in the offending words. Hence, he found that the respondent's words are true in substance and in fact. Consequently, the learned trial judge concluded that the defence of justification is available to the respondent and on that ground alone the appellant's statement of claim ought to be struck out.

From the reasonings of the learned trial judge as summarised in para. 7 above, we are unable to see how the learned trial judge can be said to have erred in principle. We find that he had indeed taken into account relevant considerations – including the matter of the two convictions and the facts as related to the Sessions Courts. We also find nothing in his judgment that can indicate that he had asked himself the wrong questions. We also agree with the learned respondent's counsel that on the authorities of *Marchioness of Huntley v. Gaskell* [1905] 2 Ch. D 656 at p. 667 and *Re Tan Ah Poi; ex p Multi-Purpose Finance Bhd.* [1999] 2 MLJ 555 at 561, the convictions of Munawar and Sukma are conclusive and final.

It was argued by the learned appellant's counsel that the admitted facts in *Munawar*'s and *Sukma*'s cases do not justify the use of the word "masturbation". On this issue, we agree with the learned respondent's counsel's contention that s. 8 of the Defamation Act 1957 would have covered the situation. Section 8 reads:

> In an action for libel or slander in respect of words containing two or distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

As to the issue of qualified privilege, it was the submission of the appellant's counsel that the learned trial judge had not considered the appellant's reply to the statement of defence as found in p. 89 of the Appeal Record (AR). It was contended that the judge did not consider the issue of malice as raised in that reply.

The learned respondent's counsel drew our attention to the fact of incessant attacks by the appellant of the respondent, UMNO, the government, the police force and the Attorney-General. These attacks, according to the respondent, were given wide publicity. As such, the learned counsel urged us to hold that, in the circumstances, the respondent rightly perceived a right to reply to those attacks. It was also submitted by the respondent's counsel that there were fervent calls made on the respondent to explain the appellant's removal from his cabinet and party positions. It was also contended by counsel that the removal of the appellant from his cabinet and party positions were matters of public interest and consequently it was the respondent's duty to explain the said removals to the nation. Under the aforementioned circumstances, it was contended by the respondent's counsel, that there can be no place for malice in the matter.

In his judgment, the learned trial judge, in our view, rightly referred to para. 14.49 in *Gatley on Libel & Slander* (9th edn) for guidance. He then set out in his judgment, the relevant facts that led him to conclude that the statement or the offending words were spoken by the respondent "on an occasion of qualified privilege". We had carefully perused the learned judge's judgment on this issue and we are unable to find anything in his judgment that can indicate that he had erred in law or facts in his reasonings and conclusion on that issue. And at p. 126 AR, the learned judge had indeed considered the issue of malice. He had set out his reasons for concluding that the respondent's mind was "devoid of malice" when he uttered the statement/the offending words. We are also unable to disagree with his reasonings and conclusion on this "malice" issue. Further, in the light of the case of *Lange v. Atkinson 3 NZLR* [1988] 424 which "held that the defence of qualified privilege applied to generally-published statements made about the actions and qualities of those currently or formerly elected to Parliament ... so far as those actions and qualities directly affected their capacity (including their personal ability and willingness) to meet their public responsibilities", we are of the view that the decision of the learned trial judge on the issue of qualified privilege should not be disturbed.

On the premise of the abovementioned paragraphs, it is clear that the respondent was sheltered by the defences of justification and qualified privilege when he uttered the offending words or the statement. It is very plain and obvious that the claim of the appellant is obviously unsustainable (*AG of Duchy of Lancaster v. L & NW Rly Co.* [1892] 3 Ch. 274 referred to in the Supreme Court case of *Bandar Builder Sdn. Bhd. & Ors. v. United Malayan Banking Corporation Bhd.* [1993] 4 CLJ 7).

At this stage, it may be pertinent to note the following words of Salmon LJ, in *Levene v. Roshan* [1970] 1 WLR 1322 at 1324:

> In the circumstances ... it would have been apparent that the defence was **bound to succeed**. To have persisted with the action would clearly have been an abuse of the process of the court ... Indeed, if ... a judge were to exercise his discretion by refusing to strike out the statement of claim, this court would have no hesitation in coming to the conclusion that that was a wholly wrong exercise of discretion and would order the statement of claim to be struck out.

We would, in the circumstances and facts of this appeal, adopt and apply Salmon LJ's aforequoted words. Consequently we dismiss with costs the appellant's appeal and confirm the learned trial judge's order to strike out the appellant's suit with costs.